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Supreme Court, U.S.
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NO. 88-26

In The

Supreme Court of the United States

October Term, 1987

EDWARD M. CARMOUCHE,

Petitioner,

v.

AUSTER OIL & GAS, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Respondent, Auster Oil & Gas, Inc. ("Auster"), respectfully submits this brief in opposition to the petition for writ of certiorari filed herein on behalf of Edward M. Carmouche (hereinafter "Carmouche"). For the reasons offered herein, Auster respectfully maintains that the requested writ of certiorari is not warranted, considering all the evidence that both the trial court and Court of Appeals found sustaining the jury's findings of fact, and the absence of any real legal issues. In sum, the Court of Appeals' interlocutory decision to allow petitioner a new jury trial on the limited issues of the appropriate amounts of actual damages and punitive damages has a firm foundation based on the separate jury verdicts and the opinion of the trial judge, as well as all the applicable legal authorities. Carmouche has not provided accurate or sufficient arguments to justify the extraordinary relief requested, that is, certiorari review of that interlocutory decision.

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COUNTERSTATEMENT OF THE CASE

Auster will not attempt to correct every misstatement or incomplete statement of fact in the petition, to keep this opposition as short and succinct as possible. However, the following corrections or additions are absolutely necessary to set the record straight, *if* the Court finds it appropriate to reopen any of the factual inquiries already resolved by the lower courts, at this stage. First, Carmouche has not acknowledged but cannot dispute that his petition is asking the Court to exercise certiorari jurisdiction to review an interlocutory decision, that is, the Court

of Appeals' order granting a limited new trial. The petition is also clearly premised on reopening inquiry into the jury's fact finding, which both the trial court and Court of Appeals approved. It should also be noted that the petition for certiorari filed herein on behalf of Harold H. Stream, III and M.G.S. Lake Charles, Inc. ("the Streams") was dismissed by stipulation pursuant to Rule 53 on May 24, 1988, and there are no other writ applications pending (Respondent's Appendix A-1). Auster and the Streams have filed a stipulation for dismissal of said defendants in the district court, pursuant to F.R.C.P. Rule 41, dated June 9, 1988 (Resp.App. B-1).

In addition, Carmouche's statement of the case is replete with several other important omissions or misstatements. For example, the description of Mrs. Stream's ownership interests does not acknowledge that those interests were all subject to Auster's right to full control of all operations on the subject property, as stipulated by the Streams and Carmouche in the pre-trial order (R-Vol.6, pp.1063-65).

As for the extent of Carmouche's involvement, the Court of Appeals summarized the evidence as follows:

> "There also is sufficient evidence to find that Carmouche was personally involved in the microdot operation. He delivered the microdots to the agents and state police on the day they inserted them into the wells. There was evidence that Carmouche was routinely informed by Mize of the planning of the operation and of its potential legal consequences. Furthermore, a major defense of the Streams at trial was predicated on the theory that they were acting at all times on the advice of counsel. For Carmouche now to claim that there was no evidence that he was involved

> in or knew anything of the actual operation is most unconvincing." 835 F.2d 597, at 602 (Pet.App. 20B-21B).

Accordingly, where Carmouche's statement of the case offers a much narrower version of his involvement, that account is only based on excerpts of his self-serving testimony, and not the complete record considered by the Court of Appeals. To the extent it may or may not be pertinent at this stage, the following is a more detailed account of facts supporting the Fifth Circuit Court's conclusion that the evidence of Carmouche's direct involvement was sufficient.

After Mize met with the State Police on July 28, 1983, he wrote several memos and had several conferences with Mr. Carmouche, discussing the microdot project (see Exh. P-27, pp.113-135 and [R-Vol. 19, p.668]). For example, in his 8/30/83 memo showing a "c.c." to Carmouche, Mize gave a detailed report on the status of the microdot operation (A-58). In addition, the microdots bore Carmouche's name and phone number.

The jury also reasonably concluded that Mr. Carmouche was aware of the 7/28/83 Mize memo warning against liability for tampering with Auster's equipment (P-30), since Mize confirmed that it should have crossed Carmouche's desk, even though he claimed that Carmouche did not read 85% of the memos Mize gave him (Vol.19, p.593). They had good reason to reject Carmouche's and the other defendants' attempted explanations of these facts, especially the story that Carmouche was not in charge of the whole operation, which simply did not ring true.

The jury was also aware that Mr. Carmouche had acknowledged receiving his associate's memorandum in

May of 1983, setting forth a legal method for proceeding to test Auster's equipment (A-33; R.Vol.20, p.689), which he rejected in favor of a clandestine operation causing $250,000 in property damages and exposing Auster personnel to risk of great bodily harm.

The jury did not rely on pure vicarious liability in deciding that Mr. Carmouche was liable. The jury found Carmouche directly responsible and the most culpable. Judge Walter was so well-satisfied with the foundation for that decision that he did not require the parties to review the evidence on that issue in their post-trial memoranda. Furthermore, Carmouche cannot dispute the correctness of the jury instructions as to the absence of vicarious liability, since his trial counsel specifically approved those instructions as sufficient to answer the only question the jury had on the subject of vicarious liability (R-Vol.22, pp.375-76).

Although any more in-depth analysis of factual details should not be appropriate at this stage, the background to the 9/25/83 break-in is also relevant to any inquiry into the complete facts supporting the jury's liability verdicts and the lower courts' decisions. On behalf of the Streams, the Carmouche firm began researching strategies for breaking the Auster Leases in early 1983 (P-27, 3/16/83 memo cited on p.71). Carmouche accused Auster of either diverting or permitting the diversion of massive quantities of oil through a secret network of pipelines (P-19). Since Auster and its partners stood to lose three times as much as the Streams from any oil theft, Auster investigated the matter, giving lie detector tests to all of its employees and checking with law enforcement officials, but found no evidence of any theft (R-Vol.15,

pp.80-83). Auster asked Carmouche and the Streams to supply any evidence they had of theft, but that request was refused (P-20, R-Vol.15, pp.82).

In May of 1983, one of the associates in the Carmouche Firm researched and recommended a legal method of sealing the lease premises under court order and testing for any secret pipelines or evidence of oil theft (A-33). That recommendation was never followed. Although the State Police and the FBI had been working with the Carmouche Firm to investigate their unsubstantiated claims of massive oil thefts, when no evidence surfaced those law enforcement agents withdrew from the investigation (A-85, and R-Vol.20, p.719).

In July of 1983, the Carmouche Firm convinced the State Police to provide more assistance with an operation to insert tracers in the flowlines of the producing equipment on the Auster leases. The State Police insisted that the Carmouche Firm assure them of their authority and that the Streams and Carmouche provide the persons who would actually break into the producing equipment (A-85). Carmouche was well aware that liability could be incurred for proceeding with the operation without Auster's permission, but decided to proceed anyway (P-30 and A-45).

Joe Mize advised Carmouche in a legal memo dated 7/28/83 that the operation would expose them to liability for unauthorized tampering with Auster's equipment (P-30). After that memo, the only research into the exposure for liability was a total of one hour on 8/2/83, and nothing was documented to rebut Mize's original opinion, even though most everything else in the file was well-docu-

mented (P-27, p.114). The defendants had engaged a detective named Rick Lucas to assist in the operation, at the rate of $1,000 per day, with no invoices requested or secured for the work (P-27 and R-Vol. 19, p.553). Lucas admitted he expected that he could go to jail for his role in the microdot operation (R-Vol.18, pp.448-49). Carmouche was aware that Lucas had previously offered a witness a substantial sum of money to give testimony to the effect that Auster was stealing (P-27, p.68, R-Vol.18, p.418; R-Vol.19, p.641).

Before proceeding with the operation, Carmouche realized that permission had been obtained from other operators on other leases whose equipment was being tested (A-58). Nevertheless, the operation proceeded without Auster's permission. Troop D Captain Norman Roy and Trooper Ricky Fox were engaged to act as lookouts (riding horses provided by the Streams), unbeknownst to the officer supposedly in charge of the State Police (R-Vol.20, pp.800-02). Carmouche knew that no court order or warrant had been obtained and the State Police knew they did not have probable cause to proceed (R-Vol. 19, p.604 and R-Vol.20, pp. 931-32, 937).

Carmouche and the Streams stipulated that Auster had full control of all operations on the subject lease premises. Through the testimony of John Hogan, Ray McClelland, Robert Mitchell and Thomas Harrell, Auster presented ample evidence, from both a subjective and objective position, that Auster had the reasonable expectation that no one would break into or tamper with their equipment, or insert foreign objects in the equipment, without prior notice to Auster.

John Hogan, President of Auster, testified that Auster had not allowed anyone, including nonoperators and

shareholders, to tamper with the production equipment without Auster's permission, because of the danger such tampering would present (R-Vol.17, pp.180, 182-183). When counsel for Carmouche questioned Robert Mitchell, Auster's gauger, as to whether Auster wanted to maintain any secrecy as to the route of its pipelines, Mitchell confirmed that Auster did not have any interest in concealing the route of those lines. However, Mitchell also testified that no one had ever been allowed to tamper with the equipment without Auster's permission (R-Vol.17, p.204). Mitchell explained that any unauthorized tampering with production equipment would endanger lives (R-Vol.17, pp.201-202). Auster's Field Superintendent, Ray McClelland, confirmed these same facts in his testimony (R-Vol. 17, pp.223, 225):

> "A It was a potential danger there. Somebody knock that choke cap loose when they had all that pressure on it, it could have blown that thing through them." (R-Vol.17, p.225)

Auster also presented uncontradicted expert testimony from Professor Thomas A. Harrell, Director of the Louisiana Mineral Law Institute, who confirmed that it was well-recognized in the custom and practice of the oil and gas industry that:

(1) The Streams had no right as non-operating working interest owners to interfere with Auster's operation of producing oil equipment on the subject property (R-Vol.20 pp.854-858).

(2) The Stream Defendants had no right under the lease observation clauses or under the lease royalty provisions to conduct the microdot break-in operation (R-Vol.20, pp.859-864).

(3) The Stream Defendants had no right as limited partners in Auster Drilling Programs 4 and 5 to conduct the microdot break-in operations (R-Vol. 20, pp.867-869).

(4) The Stream Defendants' ownership of stock in Auster gave them no authority to take the actions in question (R-Vol.20 pp.869-870).

As Professor Harrell testified, "I cannot conceive of anybody doing anything to a producing well without letting the operator know what's going on." (R-Vol.20, p.858).

The microdots caused physical damage to the equipment and the loss of substantial oil reserves, worth between $190,000 and $290,000 (R-Vol.21, pp.77-80), exposed the Auster personnel to serious risk of bodily harm, and caused Auster to incur additional expenses to tighten lease security (R-Vol.17, pp.201-02,225).

Having provided this brief statement of some of the most material facts omitted from or misstated in Carmouche's petition, a more detailed review of the pertinent facts is offered, where appropriate, in the following reasons for denial of the writ and argument on same.

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REASONS FOR DENYING THE WRIT

I. Exercise of certiorari jurisdiction is completely inappropriate in this case as a matter of general principles, since the petition: (a) seeks review of an interlocutory decision, (b) is premised upon disputes of factual findings, and (c) fails to completely disclose the material facts and issues addressed by the Court of Appeals.

A. The petition fails to provide any justification for the extraordinary relief of certiorari review of an interlocutory decision.

B. Certiorari review is not warranted to review findings of fact made by the jury, which the trial court and Court of Appeals found were supported by substantial evidence.

C. The petition's abridged version of the material facts of record does not provide the foundation required for review by certiorari.

II. In addition to the general principles precluding review by certiorari, there is no valid reason for granting the petition considering the complete basis for the decisions in this case, as opposed to the petition's inaccurate, misleading and abridged version of same.

A. The Court of Appeals correctly stated and applied the protections afforded by the Fourth Amendment that were violated by petitioner's unreasonable and permanently damaging seizure of Auster's operating production equipment. In arguing about open fields and the lack of any secrecy as to the interiors of equipment or the route of flowing oil, petitioner is again erecting a straw man that the lower courts correctly ignored.

1. The petition omits any reference to the stipulated fact that Auster was entitled to full control of all operations on the subject lease, that is, the exclusive right to operate the production facilities and equipment. Based on those stipulated rights, uncontroverted evidence established Auster's reasonable expectation that no one would break into the producing equipment and endanger the property of Auster and the lives of its personnel, without notice to and permission from Auster.

2. The Court of Appeals recognized the open fields doctrine and correctly found it not pertinent to the petitioner's unreasonable and permanently damaging seizure of Auster's operating production equipment. The

Fifth Circuit Court did *not* base its decision on any unauthorized extension of the open fields doctrine, contrary to what is represented in the petition.

B. In contending that the Streams' consent to the microchip operation voids any Fourth Amendment violation, the petition erroneously represents that Mrs. Stream had unlimited rights of access and mutual use and control of the operating equipment. The petition also relies on purported rules of law that were included in proposed, misleading jury instructions that the trial court correctly found inappropriate.

C. Employing a remarkably sanitized version of the actual facts established in the record, the petition seeks to reopen inquiry into evidence the jury, trial judge and Court of Appeals found fully supported Carmouche's liability.

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ARGUMENT

I.

Exercise of certiorari jurisdiction is completely inappropriate in this case as a matter of general principles, since the petition: (a) seeks review of an interlocutory decision, (b) is premised upon disputes of factual findings, and (c) fails to completely disclose the material facts and issues addressed by the Court of Appeals.

Before addressing the purported legal issues and incomplete or inaccurate factual statements contained in the petition, it is important to first note that granting a writ in this case would be contrary to the following three rules, any one of which provides sufficient reason to deny the

writ without any further inquiry into the details of the case at this time.

A. The petition fails to provide any justification for the extraordinary relief of certiorari review of an interlocutory decision.

This petition is without merit for one simple reason completely ignored by the petitioner. The petition seeks relief from an order granting a limited new trial solely as to the amounts of actual and punitive damages to be awarded. Without question, petitioner is asking for a writ to review an *interlocutory* order, as confirmed in *Allied Chemical Corp. v. Daiflon, Inc.,* 449 U.S. 33 (1980). In addition to the general rule that certiorari jurisdiction is to be exercised sparingly, this Court has long held that, except in *extraordinary* cases, the court will not issue a writ of certiorari until after entry of a final judgment or decree. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.,* 240 U.S. 251 (1915). In the *Hamilton-Brown* case, the court noted that the interlocutory nature of the decision questioned in a previous application for writ of certiorari "alone furnished sufficient ground for denial of the application." 240 U.S. 251 at — (see 36 S.Ct. 269 at 271). This is also the appropriate disposition of the subject petition.

B. Certiorari review is not warranted to review findings of fact made by the jury, which the trial court and Court of Appeals found were supported by substantial evidence.

Although the petition should fail simply because the subject decision is interlocutory, the petition also runs afoul of the rule that this Court will usually deny certiorari when review is sought of a lower court decision

that turns upon analysis of particular findings of fact. As Justice Holmes stated in *United States v. Johnston:*

> "We do not grant a certiorari to review evidence and discuss specific facts." 268 U.S. 220, 227 (1925).

The subject petition includes only superficial reliance on purported legal issues, while it is actually premised on an abridged version of the material facts established in the record that were determinative in the lower courts' decisions, as discussed in more detail below. The Court of Appeals concurred with the trial court's decision to uphold the jury's fact finding on liability issues. In such situations, this Court has often held that:

> "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Aire Products Co.,* 336 U.S. 271, 275 (1949) and cases cited therein.

Justice Marshall recently quoted the *Graver* case with approval, noting that this Court is unwilling to substitute its judgment for that of a jury, trial court, and Court of Appeals on essentially evidentiary questions. *International Bro. of Electrical Wkrs. v. Foust,* 442 U.S. 42, 46 in ftn. 7 (1979).

The Court of Appeals' opinion on the merits clearly indicates that the subject decisions turned upon approval of the jury's findings of fact, which the petition simply continues to challenge. 835 F.2d 597 (Pet.App. 1B *et seq.*). There is no real legal controversy in this writ application

and that alone furnishes another reason for denying the writ.

C. The petition's abridged version of the material facts of record does not provide the foundation required for review by certiorari.

As confirmed by this brief's Counterstatement of the Case, the petitioner has failed to inform the Court of numerous material facts that were obviously pivotal, determining factors in the lower court decisions. In these circumstances, this Court has even another reason for denying the writ as a matter of general principles. In *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, at 509 (1924), the Court dismissed a writ where the petition had exaggerated the importance of legal questions supposedly presented by the case. When the Court discovered that the petitioner's arguments actually hinged primarily on a question of fact, which would not have supported issuance of a writ, the Court dismissed, making the following observations:

> "Heretofore we have pointed out the necessity for clear, definite, and complete disclosures concerning the controversy when applying for certiorari.
>
> * * *
>
> "Obviously it is impossible for us critically to examine so many records before ruling upon applications, and we must rely very largely upon preliminary papers. Unless the requirements specified in *Furness, Withy & Co. v. Yang-Tsze Insurance Association* are observed, we cannot hope properly to dispose of an increasing docket." *Id.* at 509.

The Court followed this same rule in the recent case of *N. L. R. B. v. Hendricks County, Etc.*, 454 U.S. 170 (1981).

The subject petition definitely fails to make the clear, definite and complete disclosures required by the *Southern Power* decision. For example, after reading only the petition, this Court might have the impression that Mrs. Stream had some measure of control over operations of the producing equipment on the subject lease, although she stipulated that she had no such control. Likewise, reading only the abridged version of the testimony of Auster personnel and the expert testimony of Professor Harrell found in the petition, one would never realize that, while Auster made no pretense of having any privacy interest in concealing the route of oil pipelines on the lease, Auster most definitely had a very reasonable expectation that no one would break into the producing equipment and endanger Auster's property and the lives of its personnel, without notice to and permission from Auster. This was confirmed by the uncontroverted expert testimony of Professor Harrell. However, instead of addressing either of these determinative material facts, the petition dwells on the completely irrelevant open fields doctrine and Mrs. Stream's purported authority to authorize the microdot operation, contrary to her own stipulation. Accordingly, granting a writ in the complete circumstances of this case would be as improvident as the Court later found in both the *Southern Power* and *Hendricks* cases.

Any one of these three rules provides sufficient authority for summarily denying the subject petition. For this reason, a detailed rebuttal of the other contentions made in the petition may not be necessary. However, if the Court chooses to give any further consideration to those contentions at this time, the following material explains the many other fallacies in petitioner's arguments.

II.

In addition to the general principles precluding review by certiorari, there is no valid reason for granting the petition considering the complete basis for the decisions in this case, as opposed to the petition's inaccurate, misleading and abridged version of same.

A. The Court of Appeals correctly stated and applied the protections afforded by the Fourth Amendment that were violated by petitioner's unreasonable and permanently damaging seizure of Auster's operating production equipment. In arguing about open fields and the lack of any secrecy as to the interiors of equipment or the route of flowing oil, petitioner is again erecting a straw man that the lower courts correctly ignored.

Relying solely on the petition's version of the Court of Appeals' grounds for upholding the jury and trial court's factual determination that Auster had established a Fourth Amendment violation, one would believe that the court had not properly considered either the open fields doctrine or what rights Mrs. Stream did or did *not* have to authorize the microdot operation without Auster's permission. As the following material demonstrates, quite the opposite is true.

1. The petition omits any reference to the stipulated fact that Auster was entitled to full control of all operations on the subject lease, that is, the exclusive right to operate the production facilities and equipment. Based on those stipulated rights, uncontroverted evidence established Auster's reasonable expectation that no one would break into the producing equipment and endanger the property of Auster and the lives of its personnel, without notice to and permission from Auster.

In the Counterstatement of the Case, this brief provides the details concerning the Streams' and Carmouche's

stipulation that Auster had the express written contractual right to full control of operation of the producing equipment on the subject leases. Carmouche's argument still fails to address the undeniably reasonable expectation of privacy that Auster had in the maintenance of its exclusive control of the conduct of lease operations, without surreptitious interference by appellants, to avoid the danger of both personal injury and property damage, as the Court of Appeals noted in its opinion. 835 F.2d 597, at 600 (Pet. App. 9B-12B).

Carmouche ignores the specific evaluations the Court of Appeals made of the sufficiency of evidence as to each point Carmouche would now like to reargue. In particular, in its opinion, the Court of Appeals noted the following major items of evidence:

(1) "At trial, Auster introduced evidence supporting its contention that it has a reasonable expectation of privacy in conducting lease operations without surreptitious interference by appellants.";

(2) "An expert witness confirmed that under the various agreements between the appellants and Auster, appellants were not authorized to conduct the nonconsensual microdot operations.";

(3) "The parties stipulated that Auster had an *exclusive* right to operate the production facilities and equipment.";

(4) "It was further uncontested that the defendants' operation interfered with Auster's production activities.";

(5) "There was evidence that the interference with Auster's 'possessory' interest was not insubstantial, involving the dismantling of choke assemblies on the wells with resulting damage to Auster's

equipment and permanent loss of all production from the J-8 well.";

(6) "In sum, there was sufficient evidence that Appellants engaged in an unreasonable search and seizure, as defined by the prior panel, and thus the jury could properly find a violation of the fourth amendment." 835 F.2d 597, at 600-01 (Pet.App. 10B-12B).

Carmouche has also repeated his stale contention that Auster could not prove any reasonable expectation of privacy simply because its president, John Hogan, and Auster's expert, Professor Harrell, acknowledged that Auster did not care to maintain any secrets as to the content, location or route of oil produced from the lease. Auster has *never* claimed that it had any desire to maintain the secrecy of the route of the oil. Carmouche has simply erected a straw man, that is, a totally irrelevant issue. In its first panel decision, the Court of Appeals recognized that "an exclusive right to operate necessarily implies an exclusive right to possess," since "one cannot operate oil and gas production facilities without possessing them." 764 F.2d at 389 (Pet. App. 28F). Carmouche stipulated that Auster was entitled "to the full control of all operations on the subject Auster leases from Defendant Matilda Gray Stream" (F.4 of the Pre-trial Order, R-Vol.6, p.1063).

At trial, Carmouche failed to present any evidence to rebut the testimony of Hogan, Mitchell and McClelland, as to their reasonable expectations that no one would break into the producing equipment and endanger the property of Auster and the lives of its personnel, without notice to and permission from Auster. Carmouche and the other defendants also had no evidence to contradict the *complete* expert opinion of Professor Harrell, confirming that Aus-

ter's right to the full control of all operations was well-recognized to be an exclusive right, with which the Streams had no right whatsoever to interfere. On these grounds, the jury's decision that Carmouche had deprived Auster of its constitutional right to be secure against an unreasonable search and/or seizure was well-founded, as both the trial court and the Court of Appeals agreed. Carmouche's argument still fails to address the undeniably reasonable privacy interest Auster had in the maintenance of its exclusive control of the conduct of lease operations, without surreptitious interference by appellants, to avoid the danger of both personal injury and property damage, as the Court of Appeals noted. 835 F.2d 597, at 600-01 (Pet.App. 10B-12B).

2. The Court of Appeals recognized the open fields doctrine and correctly found it not pertinent to the Petitioner's unreasonable and permanently damaging seizure of Auster's operating production equipment. The Fifth Circuit Court did not base its decision on any unauthorized extension of the open field doctrine, contrary to what is represented in the petition.

The Court of Appeals' decision rested on Auster's proof of all the elements of an unreasonable *seizure* (not search) in violation of the Fourth Amendment. That seizure caused the destruction of more than $200,000 in oil reserves, which converted the temporary deprivation of Auster's possessory interests into a permanent one, following *U. S. v. Jacobson*, 466 U.S. 109 (1984), cited in the Court of Appeals' first opinion in this case. 764 F.2d 381, at 390 (Pet.App. 33F).

The Court of Appeals indicated its familiarity with the opinion in *Oliver v. U. S.*, 466 U.S. 170 (1984), the pri-

mary case on the open fields doctrine relied upon in the petition. That doctrine simply had no application to the petitioner's unauthorized and permanently damaging seizure of Auster's producing equipment. The location of that equipment in an open field did not give petitioner any authority to interfere with those operations, nor did it lessen Auster's reasonable expectation of privacy in controlling those operations. Thus, all of the petition's exaggerated argument concerning the "uncontradicted and overwhelming evidence" that the subject operations occurred in an open field is neither disputed nor in any way pertinent to the grounds supporting the Court of Appeals' decision.

The other cases on the open fields doctrine cited by petitioner are equally inapposite. The petition cites *U. S. v. Fahey*, 769 F.2d 829 (1st Cir. 1985), and *U. S. v. Marbury*, 732 F.2d 390 (5th Cir. 1984), noting that these decisions involved a gold mine and a gravel pit, respectively, which supposedly provides some parallel to the operating oil field equipment in this case. However, that is simply not accurate. In *Fahey*, the court specifically observed that the defendant was operating an unpatented mining claim, which only entitled him to ***non-exclusive*** access to or control of the operations, while any member of the public could picnic or camp on the claim. The defendant's own mine superintendent confirmed that the mine owner had no expectation of privacy and affirmed the F.B.I. agent's right to look around. In addition, the agent only took soil samples and did not seize and/or permanently damage any operating equipment at the mine. *Fahey* obviously has no bearing on Auster's case.

Likewise, in the *Marbury* gravel pit case, the law officers conducted aerial surveillance of the pit and observed certain stolen equipment on the premises, then they obtained a warrant before seizing the equipment. Thus, the *Marbury* opinion is also not pertinent to the warrantless, permanently damaging seizure in this case. Finally, the marijuana garden case, *U. S. v. Hoskins*, 735 F.2d 1006 (6th Cir. 1984), cited in the petition certainly has no application to Auster's situation.

B. In contending that the Streams' consent to the microchip operation voids any Fourth Amendment violation, the petition erroneously represents that Mrs. Stream had unlimited rights of access and mutual use and control of the operating equipment. The petition also relies on purported rules of law that were included in proposed, misleading jury instructions that the trial court correctly found inappropriate.

All the argument in the petition regarding Mrs. Stream's consent to the microchip operation ignores three fundamental points. First, the contention that Mrs. Stream had any rights whatsoever to interfere with the operation of the subject producing equipment is contrary to the stipulation made by both the Streams and Carmouche, as discussed above. The petition never acknowledges or addresses the existence of that stipulation, which was an integral part of the Court of Appeals' grounds for a decision. Instead, the petition erroneously asserts that Mrs. Stream had some common authority or mutual rights to control the operations, which is simply not true.

Next, it is also pertinent to note that the trial court rejected petitioner's efforts to present instructions to the jury regarding consent searches, which would have con-

tradicted the stipulation as to Auster's full control of operations. Petitioner submitted proposed Jury Instructions Nos. 8, 10 and 22 (Resp.Appendix C-1), regarding Mrs. Stream's purported common authority or mutual rights concerning operation of the producing equipment, all of which Judge Walter properly rejected and omitted from the final jury instructions (R-Vol.22, pp.348-374).

Finally, the petition ignores the fact that the trial court considered and rejected petitioner's efforts to raise the oil ownership question, evidently recognizing that the whole subject of ownership of the oil would not circumvent Auster's stipulated full control of operations and might confuse the jury [see the Stream defendants' proposed Special Jury Charge No. 28 (Resp.App. D-1), properly omitted from the final jury instructions (R-Vol.22, pp.348-374)]. For all these reasons, the petitioner's latest effort to circumvent the stipulated facts in this case should not be allowed to support his writ application.

C. Employing a remarkably sanitized version of the actual facts established in the record, the petition seeks to reopen inquiry into evidence the jury, trial judge and Court of Appeals found fully supported Carmouche's liability,

Considering the complete version of the evidence of record as to Carmouche's direct role in seizing and damaging Auster's producing equipment and the oil reserves under the subject leases, as opposed to the self-serving and significantly abridged version of the facts contained in the petition, there is little doubt that the jury had ample grounds for concluding that Carmouche was directly responsible. Since both the trial court and Court of Appeals have concluded that the jury had sufficient evidence to

support its verdict against Carmouche, the petition clearly does not provide any valid basis for a writ on this point.

Furthermore, petitioner has no basis whatsoever for claiming any error in the law applied on this point, that is, the absence of any vicarious liability under Section 1983. The trial court's jury instructions on the absence of vicarious liability under Section 1983 are found in R-Vol.22, pp.359-361. While the jurors were deliberating, they asked Judge Walter: "If someone acted for another person with full power of attorney, does that make that (sic) responsible" (R-Vol.22, p.375 and R-Vol.8, p.1330). *Petitioner's* counsel suggested that simply referring the jury to those particular instructions on the absence of vicarious liability would be sufficient to answer the jury's only question on that subject (see R-Vol.22, p.375, line 23 and p.376, line 10). Accordingly, insofar as the petition is premised on reopening only a factual inquiry into the basis for the liability verdict against Carmouche, certiorari review is clearly inappropriate.

———o———

CONCLUSION

Once Carmouche's petition for writ of certiorari is considered in context with the complete record and the actual grounds for the jury's findings of fact, which both the trial court and Court of Appeals upheld, one finds it apparent that Carmouche has failed to provide sufficient grounds for a writ. Furthermore, the petition certainly does not contain any valid basis for the extraordinary remedy requested, that is, certiorari review of an *interlocutory* decision of the Court of Appeals that allows peti-

tioner a new jury trial on the limited issues of the appropriate amounts of actual and punitive damages. This is especially true considering that there is no real legal controversy in this writ application, which is instead premised solely upon unsupported factual contentions already rejected by the jury and both lower courts. Accordingly, Auster respectfully maintains that this petition should be denied.

Respectfully submitted,

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BERNARD H. MCLAUGHLIN, JR.
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STOCKWELL, SIEVERT, VICCELLIO,
CLEMENTS & SHADDOCK

Attorneys for Respondent

July 12, 1988

APPENDIX A

RE: HAROLD H. STREAM, III, AND MGS LAKE CHARLES, INC. V. AUSTER OIL AND GAS, INC., NO. 87-1664

1988—May 24. The foregoing stipulation to dismiss the petition for writ of certiorari in the above-entitled case having been received by the Office of the Clerk, and no fees due the Clerk, the petition for writ of certiorari is now here dismissed pursuant to Rule 53 of this Court.

/s/ Joseph F. Spaniol, Jr.
Clerk of the Supreme Court
of the United States

(SEAL)

By: /s/ Francis J. Lorson
Chief Deputy Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

AUSTER OIL & GAS, INC.	)	
	)	CIVIL ACTION
VERSUS	)	NO. 83-3180 "LC"
	)	Judge
MATILDA GRAY STREAM, ET AL	)	Donald E. Walter
	)	

STIPULATION FOR DISMISSAL

(Filed June 10, 1988)

Plaintiff, Auster Oil & Gas, Inc. and Defendants, Harold H. Stream, III and M.G.S. Lake Charles, Inc., hereby stipulate by and through their respective attorneys of record that all claims by Plaintiff against said Defendants have been settled and compromised and may be dismissed with prejudice pursuant to Rule 41 of the Federal Rules of Civil Procedure, with any outstanding court costs to be paid by the Plaintiff, with each of said parties specifically reserving all their individual rights whatsoever against Edward M. Carmouche, his law firm, any other joint tort feasors, and their insurers, indemnitors, heirs or assigns or any other parties or insurers.

STOCKWELL, SIEVERT, VICCELLIO, CLEMENTS & SHADDOCK

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APPENDIX C

WITHDRAWN.....
GRANTED.....DENIED.....
COVERED.....MODIFIED.....

STREAM DEFENDANTS' PROPOSED
SPECIAL JURY CHARGE # 8

Although the expectation of privacy is one which you must make based upon the particular facts of this case, the law provides some guidelines which you should consider in determining whether this activity violated plaintiff's reasonable expectation of privacy. The law recognizes that people have different levels of expectation of privacy depending on the place in which the activity takes place and the kind of interest they have in the place or thing subjected to the intrusive activity. If you find that persons other than the plaintiffs have a legal right of access to the property and that this right included inspection of the wells, pipelines, or tanks then plaintiff's reasonable expectation of privacy is lower than it would otherwise be.[1] And, if you find that detection of the information disclosure of which plaintiff complains was made from an area accessible to the public, then the expectation of privacy is even lower.[2]

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[1]*United States v. Hansen*, 652 F.2d 1374 (10th Cir. 1981), *United States v. Vicnair*, 610 F.2d 372 (5th Cir. 1980), *cert. denied* 449 U.S. 823 (1981).

[2]This principle is most clearly seen in the rationale underlying the "dog sniff" cases decided in three of the federal circuits. Since the dog's detection of contraband inside the luggage is made by an inspection of the "public" airspace surrounding the luggage, this inspection is not a search. *United States v. Lewis.*

(Continued on following page)

C-2

WITHDRAWN.....
GRANTED.....DENIED.....
COVERED.....MODIFIED.....

STREAM DEFENDANTS' PROPOSED
SPECIAL JURY CHARGE # 10

If you do find that a search took place, you must then determine whether that search was reasonable, because, as I have already told you, plaintiff does not have a right for damages resulting from a search unless that search was unreasonable.

Under the American system of justice, a search warrant is usually required for a search to be reasonable.[1] However, there are several exceptions to this general rule. Under one of those exceptions, certain persons have authority to consent to the search. If the search is made with the consent of an authorized person, then the search is a reasonable one.[2] I instruct you that if you find that any of the defendants exercised common authority over the property resting on mutual use of the property giving them a right to access and control for most purposes, then defendants had authority to consent to the search.[3]

(Continued from previous page)

708 F.2d 1078, 1080 (6th Cir. 1983); *United States v. Goldstein*, 635 F.2d 356, 361 (5th Cir.), *cert. denied* 452 U.S. 962 (1981); *United States v. Venema*, 563 F.2d 1003, 1006 (10th Cir. 1977). In this case, the inspection of the oil for microdots would occur away from the well site.

[1]*Cooledge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

[2]*United States v. Gomez-Diaz*, 712 F.2d 949 (5th Cir. 1983), *cert. denied* 104 S. Ct. 731 (1985); *United States v. D'Allerman*, 712 F.2d 100 (5th Cir. 1983), *cert. denied* 104 S. Ct. 254 (1985).

[3]*Donovan v. A.A. Biero Constr. Co.*, 746 F.2d 894 (D.C. Cir. 1984); *United States v. Butler*, 495 F Supp. 679 (E.D. Ark. 1980).

Another exception is where oil companies, by virtue of their regulation by state and federal authorities, have consented to searches by state officials pursuant to the regulatory authority of the state.[4]

If you should make such a finding and if you should find that any of the defendants or the plaintiff consented to the search, then I instruct you to find that the search was reasonable and to find for the defendants.

WITHDRAWN.....
GRANTED.....DENIED.....
COVERED.....MODIFIED.....

STREAM DEFENDANTS' PROPOSED
SPECIAL JURY CHARGE # 22

An exception to the requirement of both a warrant and probable cause is a search that is conducted pursuant to consent.[1] The consent effective to validate a warrantless search may be given by a person other than a victim of the search. Such consent may be established by showing that permission to search was obtained from a third party who possessed common authority over or other sufficient rela-

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[4]*Auster v. Stream*, 764 F.2d 381, 391 (5th Cir. 1985); *Wheeler v. Cosden Oil Co.*, 734 F.2d 254, 257 (5th Cir. 1984), modified on reh'g, 744 F.2d 1131 (1984); *O'Meara v. Union Oil Co. of California*, 33 So.2d 506, 508 (La. 1947), reh. den. [The Louisiana Supreme Court in *O'Meara*, supra, specifically held that the Commissioner of Conservation was given "jurisdiction and authority over all persons and property . . .". Additionally, the Commissioner has the authority "to make inquiries, collect data, to make investigations and inspections, to examine properties, leases, papers, books and records, to examine, survey, check, test and gauge oil and gas wells, tanks, refineries and modes of transportation.]; LSA-R.S. 30:4(B).

[1]*Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2014, 36 L.Ed.2d 854 (1973).

tionship to the premises or effects sought to be inspected.[2] For purposes of validity of consent to search by one who possesses common authority over premises or effects with one or more other persons, common authority is not to be implied from a mere property interest, but rests on mutual use of the property by persons generally having joint access or control for most purposes, so that each has right to permit inspection in his own right and so that the others have assumed the risks thereof.[3] A co-owner has authority to permit a search of a jointly held possession and/or its contents.[4] If you find that any of the Stream defendants are a co-owner of the oil located in the lines opened by the defendants, then you must find that consent was validly given and any search did not violate plaintiff's constitutional rights.

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[2]*Donovan v. A.A. Beiro Construction Company, Inc.*, 746 F.2d 894, (D.C. Cir. 1984).

[3]*U.S. v. Matlock*, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974).

[4]*Jackson v Official Representatives and Emp. of Los Angeles Police Department in and for Los Angeles County*, 487 F.2d 885 (9th Cir. 1973); *Frazier v. Cupp*, 394 U.S. 731, 89 S.Ct. 1420, 22 L.Ed. 684 (1969).

APPENDIX D

WITHDRAWN.....
GRANTED.....DENIED.....
COVERED.....MODIFIED.....

STREAM DEFENDANTS' PROPOSED SPECIAL JURY CHARGE #28

A landowner who enters into an oil and gas lease in which she reserves a stipulated royalty interest is the owner of her share of the oil at the time of severance. For purposes of determining when the landowner becomes the owner of the oil, severance occurs and possession is taken at the well head.

Commissioner of Internal Revenue v. Gray, 159 F.2d 834 (5th Cir. 1947)

Texas Company v. Fontenot, 200 La. 753, 8 So.2d 689, 692 (La. 1942)

Sartor v. United Carbon Company, 183 La. 287, 163 So. 103 (1936)

Louisiana Mineral Code, Article 7, La. Rev. Statutes 31:7

APPENDIX E

LISTING OF PARENT, SUBSIDIARY AND AFFILIATE COMPANIES OF AUSTER OIL & GAS, INC., PURSUANT TO SUPREME COURT RULE 28.1

Auster Oil & Gas, Inc.

The following working interest owners:

Ashley Investments
Delhi Properties
William Fuller
Clay Hunt
Hara Hunt
Hilre Hunt
Sherman Hunt
Stewart Hunt
Todd Hunt
Ward Hunt
Jason Sowell
Jim Sowell
Mary Sowell
Carl W. Cleveland
Mirian Fricke
Janet Bodenheimer
Miss Ida Muller
Harold H. Stream, II Trust
Harold H. Stream, II
*G.S. Oil & Gas Co.
*Virgil T. Hartquist
*Bernard Ridder
*Daniel Ridder
Buttes Resources
Morton A. Cohn
W. N. Finnegen
Charles W. Austin
Ray S. Perry, Jr.
Frank P. Savoy
Estate of Paul Tate
Percy J. Fontenot
Mrs. Courtenay D. Hammond
Mrs. Helen M. Reiss
Gregory G. Manuel
C. Ellis Henican
Mrs. Elizabeth Henican
Carlene W. Rhyne
C. Ellis Henican, Jr.
John D. White
B.C.R. Trust
Mrs. Janice Veltin
Paul Tate, Jr.
*Mrs. Evelyn Davis
*Milton Pitrie
*Ben V. Schneider

Austral Oil Company (acquired the interest of persons designated*)

American Exploration Company (parent of Austral)